Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 127.

SECURITY LAND AND EXPLORATION COMPANY,
PLAINTIFF IN ERROR,

against

G. A. BURNS AND MARY L. BURNS, DEFENDANTS IN ERROR.

ERROR TO SUPREME COURT OF MINNESOTA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The points and citations of defendants in error suggest the following comments:

What is the sense in which, by this court, universality has been predicated of the rule in favor of monuments?

The contention of defendants in error that the court in its repeated declarations of the universality of the rule has

had reference to its widespread geographical diffusion, and not to the uniformity of its application, is not without a certain kind of value. It serves to show how utterly nude of every shred and semblance of verity, forensic argumentation is capable of becoming. In the rule's earliest formulation, by Story, J., in Preston's Heirs *vs.* Bowmar, 6 Wheat., 582, its universality was adverted to *for the sole purpose* of contrasting the *uniformity of its application* with the variability of the rule regulating the force of courses as against distances. By Marshall, C. J., in Newson *vs.* Pryor's Lessee, 7 Wheat., 7, 10, the rule was said to find its justification in the necessity for adopting a principle of uniform application. "*Some general rule of construction must be adopted, and that rule must be observed, or the conflicting claims of individuals must remain forever uncertain.*" In all of our other citations the meaning of the court is made equally manifest.

As was said by Story, J., in Cleaveland *vs.* Smith, Fed. Cas. No. 2874, when the attempt was made to lure him away from what he considered the monument, by specious suggestions of peculiar intent in the particular case:

> "It is essential to the protection of titles that the interpretation should depend upon known, fixed, uniform principles, and not upon the conjectures of judges or the nice balancing of possible intentions, or the supposed leading but undefined motives in a particular grant."

THE RULE IS NEVER BROKEN BY MERE MAGNITUDE OF DISCREPANCY.

There is not a single adjudication to the contrary by an English-speaking court.

A few *dicta* there are, as pointed out in our principal brief, but no adjudications. The proposition seems to be true even in Texas (as true at least, as, upon this particular subject, any proposition can be in that State), for in Burton *vs.* Caldwell, 53 Tex., 408, the supremacy of monuments was asserted in spite of a discrepancy of a thousand acres.

In this connection it is noticeable that Davis *vs.* Rainsford, 17 Mass., 207; Baldwin *vs.* Brown, 17 N. Y., 359, 361; Buffalo, etc., Co. *vs.* Stigeler, 61 N. Y., 348, 351; Booth *vs.* Upshur, 26 Tex., 64, 70, and Hale *vs.* Cottle, 21 Or., 580, 585–'6, which mark the beginning of the rule's disintegration in those States respectively, were all cases of comparatively slight discrepancy.

That all of the cases cited by defendants in error as evincing flexibility in the rule appear, upon examination, to proceed upon other grounds than the magnitude of the discrepancy, is substantiated in detail in our principal brief and in the ensuing sections of this reply. This is indeed so indisputable that in their supplemental brief the defendants in error are constrained to admit, that "if monuments

intentionally adopted are attacked for error, *only because they are more distant* from each other than returned by the surveyor, and so enclose a larger area than intended, the error, *for the purposes of construction*, will be imputed to the distances and not to the monuments" (p. 2). * * * That "the fact of a discrepancy in area does not, of itself, affect the invalidity of any title claimed by plaintiff in error" (p. 14). * * * And that "the defense in these cases does not rest upon the discrepancy in quantity, but upon the fact that because of the failure of the deputy surveyor to make any survey at all, and of the fictitious character of his return, the lands in question have never been surveyed, and did not pass under the patents" (p. 15).

It is indeed argued by defendants in error that the magnitude of a discrepancy may indirectly impair the force of a monument, not only by disclosing a fraudulent omission of actual survey, but by a bearing that it may have "upon the question of the intent of the parties to the grant;" the latter suggestion having reference, as we suppose, to the perennial issue of fact, calamitously opened up in the few States heretofore mentioned, as to whether the tract inclosed by the designated visible monuments is in truth the thing intended to be conveyed. These two suggestions we discuss under separate headings further on.

Such of the defendants' citations as are claimed to have involved a competition between an actual shore line and the courses and distances of a meander line were reviewed

in our principal brief (pp. 115–137). As to all their other authorities bearing upon monumental supremacy, unless indeed in our attempts to follow them through the mazes of their kaleidoscopic regroupings in defendants' briefs, one or two may have eluded us, we now ask the court to observe that, so far as relevant to our controversy, they resolve themselves into these four classes:

(1.) Those in which the monumental calls have been conflicting, ambiguous, or deformed by mere inadvertences of expression.

(2.) Those which either enforce the principle of monumental supremacy or are irrelevant as not involving it.

(3.) Those which proceed upon a rejection of the doctrine of this court (settled since McIver's Lessee *vs.* Walker, 9 Cranch, 173, 178), that "*it is the intention of every grant to convey the land actually surveyed;*" and upon the adoption of the opposite doctrine, that it is in each case a question of fact whether such was the intention or not.

(4.) Those that involve a repudiation of the doctrine of this court, declared in McIver's Lessee *vs.* Walker, 9 Cranch, 173, 178, and in the later decisions cited on pages 89–92 of our principal brief, that the supremacy of monuments is not impaired by the fact that they were designated without actual survey; and which set up the opposite doctrine that a mon-

ument designated without survey is to be classed as conjectural and as such is to be subordinated to course and distance.

I.

Cases of conflicting, ambiguous, or inadvertently expressed monumental calls with which defendants insist upon confusing the case at bar.

And first, a few more words about the four grievously tortured cases upon which, with so great and so obviously misplaced confidence, the defendants principally rely—the cases of Bates *vs.* Ill. Cent. R. R. Co., 1 Black, 204,208; Horne *vs.* Smith, 159 U. S., 40; Niles *vs.* Cedar Point Club, 175 U. S., 300, and French-Glenn Co. *vs.* Springer, 185 U. S., 47. In their supplemental brief the defendants appear to assume that the last-mentioned case particularly is invested with great significance by the alleged fact that counsel there pursued the same lines of argument that we do here. We are distinguishing that case, not upon the ground that it was argued differently from ours, but because it involved a *radically different state of facts.* The circumstance which made it legally possible to liken the French-Glenn Co. case to those of Horne and Niles, which, significantly enough, were the only authorities upon this subject to which the court in its opinion deemed it worth while to advert, was that at the time of the survey

there were two distinct watery margins, that of a swamp and that of a lake, so situated as to make it necessary to determine which of the two margins it was whose meanderings were noted by the surveyor. The cases are of course numerous in which either the edge or the thread of a marsh has been utilized as a monument, its fitness for that purpose varying with the distinctness with which it is traceable upon the ground.

Felder *vs.* Bonnett, 2 McMullen's L. R., 44.
Cherry *vs.* Slade, 3 Murph. (N. C.), 82.
Spuill *vs.* Davenport, 1 Jones L. (N. C.), 203.
Rowe *vs.* Cape Fear Co., 45 S. E. (N. C.), 830.

Whether it was the part of wisdom to admit such a case as that of the French-Glenn Co. into the same class with those of Horne and Bates by likening a competition between a lake shore and the margin of an adjacent and probably connected swamp to a competition between a river and a neighboring branch or bayou (although there was no double meandering, as in the Niles case, to evince the surveyor's intention to distinguish marsh from lake), it is unimportant to inquire. It's tranquilizing tendencies are not obvious. But that, at all events, is what the court did, and what confessedly it is impossible for it to do in the case at bar. Although the principle of the French-Glenn Co. case would, as we think, have been better disclosed had the learned justice who wrote the opinion brought the marsh more promi-

nently into the foreground, there is no mistaking the scope of the decision when it is read upon the approved method of paying as little attention as possible to the language, and as much attention as possible to the facts actually involved and to the points therefore actually adjudged. Most of the testimony even on behalf of the plaintiff, The French-Glenn Co., tended to show that it was rather marsh than lake that bounded its tract on the north at the time of the survey. (See pp. 37–40 of Record in French-Glenn Co. case.)

It is therefore a misapprehension to suppose that any of these four cases hinged upon any form of competition between courses and distances on the one hand and monuments on the other. In the Horne and Bates cases, where the object in fact meandered was a well-defined waterway, it was confessedly that waterway and not the courses and distances of any meander line which was adopted as the true boundary. The same was true in the Niles case, where the object actually meandered was a swamp, and where the coincidence of the meander line with the margin of the swamp was expressly stipulated as a fact (175 U. S., 301, 302) and expressly assumed by the court (p. 306). In the French-Glenn Co. case there was nothing to show the lack of coincidence; and even though the coincidence had been denied, it might well have been considered that after the lapse of so many years, and in the face of conditions so changed, the original location of a margin of no greater distinctness and permanence than that of

a marsh could not be more reliably determined than by reference to the reported courses and distances, as in other cases of lost monuments. Each of the four cases, therefore, is a typical instance of that form of conflict or competition between monuments which arises from ambiguity. For a competition between monuments may arise not only through an improvident designation of several monuments which prove to be irreconcilable with one another, as was the case in White *vs.* Luning, 93 U. S., 514, 525, but through a description of a single monument in terms which prove to be partly applicable to one object and partly applicable to another. Thus in each of the four cases under consideration there is a double description by the surveyor of the marginal monument which he had in view: (1) by specification of its locality, *i. e.*, its course and distance from some other object; (2) by its specific or class name. It turns out that there are two margins, each of which is pointed at by one branch of the description. In cases of this kind, as manifestly as in cases of strict conflict, what the courses and distances do is simply to identify the true monument.

In all four of the cases under consideration the unsuccessful attempt was to induce the court to adopt as boundary a margin which confessedly was not the one meandered by the surveyor. In all four cases this was urged upon the ground that the surveyor ought regularly to have meandered not the margin which he did, but the other; and to

this contention there was added in the Horne case and the French-Glenn Co. case the argument that the nomenclature of the surveyor denoted a mistake on his part, not as to the location, but only as to the nature, identity, or name of the margin upon which he terminated his survey. The margin of Cedar Island lake which we claim as a boundary is confessedly the very margin which, by the courses and distances of his meander line, the surveyor attempted and intended to describe.

A refusal to deflect side lines would not avail the defendants.

It must, moreover, be borne in mind that even though the French-Glenn Co. case could be regarded as laying down the inscrutable doctrine that courses cannot be deflected in pursuit of a monument, it would not avail these defendants.

Section four, for purposes of survey, is an entirety. Its four exterior lines are the only lines required to be actually run. Its south and east lines, each of which was returned as intersecting the lake (Exhibit "A," p. 77½, and the field-notes at pp. 32, 35 of Record) *do not require deflection in order to reach it.*

Again, even though each quarter section or forty-acre tract be considered separately, and the lines of no lot deflected, any area relieved by refusal to carry lot 3 to the

lake because deflection would be necessary would be covered by lots 5, 6, and 7. Lot 7 would confessedly reach the lake without deflection and within the limits of section 4. As to lots 5 and 6, the objection that if undeflected they cannot reach the lake within the limits of section 4 is palpably fallacious. According to the plat, *the lake is at the same time the eastern boundary of lots 5, 6, and 7 and the eastern boundary of section 4.* The east line of section 4 must go to the lake as obviously as the east line of the particular lots; they are one and the same and move unavoidably together. Hence, no matter how far the east line of lots goes in pursuit of the lake, for them to pass the bounds of section 4 is an impossibility.

Of the defendants' other citations, the following also are pure cases of conflicting or ambiguous monuments, the courses and distances being resorted to for no other purpose than to distinguish the true monument from the false.

Murdock *vs.* Chapman, 9 Gray, 156 (cited by defendants page 22 of principal brief). Reading the deed and plat together, the conveyed tract was there described as extending by a certain course and distance to a certain lot which was described, (1) as the Randall lot, (2) as lot 7, evidently upon the assumption that lot 7 was the Randall lot. This assumption proving to be mistaken, it became necessary to determine which of the two lots the parties really had in view, which was the ideal function of the courses and distances.

King *vs.* Watkins, 98 Fed. Rep., 916 (cited at page 23 of defendants' principal brief), besides being a case of conflicting monuments, as pointed out on page 137 of our principal brief, was reversed by the circuit court of appeals (55 C. C. A., 290).

Shoemaker *vs.* Hatch, 13 Nev., 261–266 (cited at page 33 of defendants' principal brief). The only question there involved was, as in Horne *vs.* Smith, whether the survey terminated upon the main channel of a river, or upon a side channel (pp. 265–266).

Such also is McCormick *vs.* Huse, 78 Ill., 363 (cited at pages 37–38 of defendants' principal brief).

Such also is Hostetter *vs.* Los Angeles Ry. Co., 108 Cal., 38, 43 (cited at page 37 of defendants' principal brief), where, from ambiguities characteristic of all California rivers, it became a dark question where and what was the river, and whether it was the "river proper," or the east line of "the official bed," that the parties had in view as a boundary—a doubt which would, of course, ordinarily be solved by reference to the specified distances.

Of the cases cited on page 14 of the supplemental brief, the following also fall within the class under consideration:

Schlosser *vs.* Hemphill, 90 N. W. Rep., 842, was a duplication of French-Glenn Co. *vs.* Springer. The competition was between the line of a swamp and the line of a neighboring lake, as repeatedly recognized in the opinion of the court, where it is said:

> "That there was swampy and low land in section 30 north of plaintiff's lots, admits of no question, and in wet seasons a large part of it was covered with water" (p. 843). "No body of water necessary to be meandered;" * * * "The body of water was temporary, and no meander line should have been run there." * * * "No permanent body of water of any considerable size existed there" (p. 843).

Hamilton *vs.* Foster, 45 Me., 32, was an acknowledged case of conflicting monuments, the court saying:

> "It is not, then, a case where monuments cannot be found, but where they cannot be reconciled one with another. And if no mode could be found to ascertain the intention of the parties as disclosed by the monuments, it is a case analogous to one where monuments fail. In such a state of things, courses and distances are to govern" (p. 40).

Field *vs.* Columbet, 9 Fed. Cases, 12. Here again there was acknowledged conflict between monuments, to wit, between a call to proceed "along the Lomas Atlas hills," and a call to reach "the aforesaid wagon road to Galindo's house." The former call was rejected in favor of the latter, the specification of quantity being deemed a sufficient guide to the true monument.

Jamison *vs.* Fopiano, 48 Mo., 194, was another case of ambiguity in the designation of a monument. The call for a boundary "on the west by block No. 42," if standing alone, would have imported, no doubt, a boundary on the east line

of the block. But the land conveyed was also described as the tract "laid down on the map aforesaid as the claim of Michael Lami," which Lami tract overlay the easterly part of block 42. This was justly held to show that the parties had in view as a west boundary, not the easterly edge of block 42, but that part of the block lying west of the Lami claim. It was like resort to distance in peculiar cases, to determine whether the reference is to the margin or to the thread of a stream.

Although we believe they are not illustrated by citations made on behalf of defendants, there is undoubtedly a class of cases in which monuments may be rejected as having been falsely designated through mere inadvertencies of *expression*. Of this class Evans *vs.* Green, 21 Mo., 170, may serve as an example. There was there a call for the southeast corner of an adjoining tract as a monument. There were enough attending circumstances to make it clear that the corner which the parties had in mind was the southwest corner. It will be observed that in such a case the mistake is that of the scrivener only in failing to correctly name the object or point which was in the mutual contemplation of the parties.

II.

Cases which either enforce the principle of monumental supremacy or are irrelevant as not involving it.

Platt *vs.* Vermillion, 90 Fed. Rep., 356–367 (cited at page 37, defendants' principal brief), holds only that the calls may be reversed, if necessary, to make the lines close, and that a line run on the ground controls a call for the line of a previous survey, the case following upon this last point the doctrine of the courts of Texas, where the controversy arose, despite the contrary ruling of this court in Land Co. *vs.* Saunders, 103 U. S., 316.

So, under this class fall the following citations from page 14 of defendants' supplemental brief.

Hall *vs.* Eaton, 139 Mass., 217, 221, was a case of conflict between the course and the distance, no monument being involved.

Lamprey *vs.* Meade, 54 Minn., 290, 299, was a case in which the principle of monumental supremacy was most impressively enforced, as noted upon pages 55–56 of our principal brief. The court merely recognized, by way of dictum, that an extreme discrepancy would give rise to the legal question which is here under discussion, to wit, the question of the limitations, if any, upon the distance to which the courts will go in pursuit of a monument.

Fuller *vs.* Shedd, 164 Ill., 462. In that case, also, the supremacy of the monuments was enforced. All that was said in recognition of the doctrine of the overruled case of Granger *vs.* Swart and its illegitimate progeny was by way of *dictum* only.

Erskine *vs.* Moulton, 66 Me., 276, merely holds that the rule which ordinarily carries to the center or thread of the stream land which is described as bordering upon the stream should not be applied in a case where, although the land is described as running to a cedar post on the bank of the stream, and then by the stream, etc., a plat is annexed to which reference is made for fuller description, and which shows upon its face that the tract does not extend even as far as the low-water mark.

Heald *vs.* Yumisko, 7 N. D., 422, is another of the cases in which the supremacy of monuments was rigidly enforced and the shore line held to constitute the true boundary, instead of the meander line, which was relied upon there as here.

Cansler *vs.* Fite, 5 Jones' L., 424, is another of the cases clearly recognizing the supremacy of monuments, to which, it is said, the lines must be run " regardless of distance, and even though the designated monument is an adjoining tract, the boundaries of which can only be traced by pursuing the courses and distances of another deed." The ground upon which the case was withdrawn from the operation of the general rule was that the monumental call was for a

marked tree "*near*" the line of an adjoining tract, and that no such tree being found, the monument failed, thus justifying resort to the courses and distances to determine its original location.

Bagly *vs.* Morrill, 46 Vt., 94, 99, 100. Here again the rule in favor of monuments is recognized as being inflexible when the existence and location of the monuments can be proven (pp. 99, 100). The court said:

> "In the case at bar no monument is mentioned in the deed, as already stated, which is shown to conflict with the courses and distances."

III.

Cases which proceed upon a rejection of the doctrine of this court (settled since McIver's Lessee vs. Walker, 9 Cranch, 173, 178) that "it is the intention of every grant to convey the land actually surveyed," as distinguished from a tract enclosed only by ideal lines.

That doctrine presupposes that the courses and distances between monuments are introduced, not as an independent and competitive description of the land to be conveyed, but as an aid to the identification of the monuments; as is pointed out by Chief Justices Gibson and Bibb, and by Judges Caton and Henderson, in the decisions quoted at

pages 46–52 of our principal brief. It rests bodily upon the singleness of the description. It is therefore departed from by all the New York, Massachusetts, Texas and Oregon cases cited by defendants, all of which start out by assuming that specifications of course and distance are an independent description of the land, which although ordinarily to be regarded as less trustworthy than the monuments, may at any time outrank and displace the monuments, by force of any special circumstances indicating that they describe more nearly than the monuments the property which was intended to be conveyed. The four stages in the progress of the heresy have been the same in each of the four States. They consist of the following four fallacious assumptions: (1) That there are two descriptions of the land to be conveyed instead of one; (2) that it therefore may or may not prove to be that the land demarkated is the land intended to be conveyed; (3) that the only reason for the supremacy of monuments is that mistakes are generally less likely to occur with respect to them, thus expressly repudiating the doctrine of this court that the true reason is that it is the demarkated tract and nothing else that the parties intend to convey; (4) that whenever, therefore, there appears under the circumstance of a particular case, to be less probability of error in the courses and distances than in the monuments, the former should prevail. These are precisely the processes by which, in the Rainsford case, the Massachusetts court was led (independently of the fact

that there was there a conflict of monuments) to award supremacy to distance, by reason of the extreme smallness of the distance there involved, and the consequent supposed improbability of mistake in measuring it; and by which the New York court in the Stigeler and Baldwin and Higginbotham cases was led to the same result, by the trivial circumstance that the parties appeared to have figured correctly, so as to make the specifications of area correspond to those of the dimensions.

Indeed the four fallacies above enumerated will be recognized as the identical propositions to the vindication of which almost the entire briefs of the defendants in error are devoted.

At page 14 of their supplemental brief, defendants adduce authorities claimed to show that the doctrine of the four heretical States has received countenance in twelve other jurisdictions. We elsewhere review these citations, and point out that there is not a single supporting case in the entire list. The only cases outside of the four States which have a tendency to support the positions of the defendants are the few meander-line cases reviewed in our principal brief at pages 125–132, resting confessedly on the overruled doctrine of Granger *vs.* Swart, 10th Fed. Rep., 961, that a meander line is a line of boundary.

Then as to the proposed rejection of the lake as a monument on the theory that the call for it is false or mistaken. In those States, such as Texas, where contrary to the doc-

trine of this court, the land covered by the survey is determinable rather by artificial marks or parol testimony showing where the surveyor actually went, than by reference to the natural landmarks for which he calls, there is a logical basis for the rejection of the latter by mere process of construction, as false or mistaken, *where an actual survey has been made*. Whenever it is legally assumed that the predominant and mutual intention is to convey the land around which the surveyor chained, and he afterwards swears that he did not chain to the monuments which he reported, the latter must be rejected as not enclosing the land which the parties had in view. Such a case was Johnson *vs.* Archibald, 78 Texas, 96. But even in such jurisdictions it is confessedly impossible to reject the monument as false or mistaken where, as in the case at bar, there has been no actual survey. Such was McAninch *vs.* Freeman, 69 Texas, 445–447, where, *because there had been no survey*, a corner of an adjoiner, called for as a monument, was held to prevail over course and distance; it being indicated that only in the event of a monument being proven erroneous by the making in fact of measurements which did not reach the corner, could the call for the corner be regarded as a mistake. Yet while claiming expressly that this is a case where there was no actual survey, and while accusing us of saying with undue solemnity undisputed things when we mass the authorities to show that mere magnitude of discrepancy never breaks the supremacy of

monuments (pp. 1 and 2 of their supplemental brief), the defendants still fatten their briefs with reiterations of the claim that every monument is false which "is not found at the place where designated" (pp. 27, 5, 8, 17, 18, 19, 22, 35, 60 of defendants' principal brief).

When an original instrument can be rejected upon the ground that a copy is better evidence of its contents, and of the intentions of the parties, the monuments of a survey may be rejected in favor of an attempted written description of them and their locations; for, as observed by Mr. Freeman in his note to 30 American Decisions, 738, the rule in favor of monuments "is founded upon the same principle which makes an original paper better evidence than a copy of it."

An equally forcible, though very different, presentation of the logical impossibility of rejecting a monument so long as it can be identified as the object referred to, is furnished by Lord Chancellor Cranworth's opinion in Lyle *vs.* Richards, L. R., 1 E. and I. App., 222, which confirms most strikingly our previous citations to the effect that specifications of distance are to be deemed descriptive of the monuments only, and not a competitive description of the land. On this subject the Lord Chancellor said:

> "Translating, so to say, the map into words, it is as if the description had been 'the boundary to the south is a line drawn from the northeast corner of John Vincent's house, which is situate sixty fathoms

> to the west of the southernmost point of the road,' whereas in fact the house is situate within five fathoms of that point. This inaccuracy would not, as I think, have been material. The boundary line would still be a line drawn from the northeasterly extremity of the house wherever situate, assuming of course that the jurors were satisfied that the house really existing is that which was referred to in the deed. The circumstance that *its locality* was erroneously described would not affect the description of the boundary line, namely, that it was to be a line drawn from its northeast corner. When once the jurors were satisfied that the house is that referred to in the deed, the error *in the description of its locality* is no more material than if there had been error in describing it as brick-built instead of stone-built, or as a house of three stories instead of two. No error is material which would not prevent the jury from being satisfied that the existing house is the house referred to in the deed."

The defendants do indeed cite one case, Bentley *vs.* Rickabaugh, 62 Pennsylvania State, 281, which seems at first blush to support the theory that in case of a discrepancy of great magnitude resulting from mistake or fraud of the surveyor, the monuments may for that reason be subordinated to the courses and distances.

But the appearance of support is a false one. To be read understandingly, the case must be read in the light of the fact that in Pennsylvania equitable relief is administered as a part of the common law, so that habitually in actions of ejectment, juries, by assuming documents to have been

reformed to meet the ends of equity, administer without any pleading specially applicable to it, the same kind of relief which in other courts could only be obtained by an equitable decree of reformation upon the ground of fraud or mistake.

> "Where there is a plain mistake or fraud, the courts of Pennsylvania, through the intervention of a jury, may reform the agreement to make it agree with the deed and make the deed agree with the real title of the parties. In some places the law is not so liberal as that, and the parties may have to go into a court of equity; but here our common-law courts have such equity powers as to enable them to remedy accidents, mistakes or frauds."
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> Trexler *vs.* Fisher, 130 Pa. State, 275, 278, 279.

So that the Pennsylvania citation merely supports the proposition, which we have not denied, that in the case of gross fraud or mistake relief of some kind may probably be obtained through equitable reformation of the instrument.

It is not unlikely that such confusion as has arisen with reference to the reason of the rule in favor of monuments may be largely traceable to the fact that one clause in the opinion of Chief Justice Marshall in McIver's Lessee *vs.* Walker, 9th Cranch, 173, is so expressed as to make it possible to misconstrue it in the manner now proposed by these defendants (pp. 10 and 11, defendants' supplemental brief).

That the proposed construction is a false one is demonstrable:

(*a.*) The Chief Justice states the reason twice; declaring first that the rule in favor of monuments is a *consequence* of the fact that the intention of every grant is to convey the land according to the actual survey, and then reiterating the same truth in slightly modified form by affirming in direct terms that the fact that such is the intention of the parties is the reason of the rule.

(*b.*) It is only *because* such is the intention—it is only when you are in pursuit of the tract actually demarkated, that mistakes in course and distance are more probable than in the monuments. It is as though the Chief Justice had said: "And in the search for the tract so actually surveyed, mistakes in course and distance are more probable," etc. *Mistakes in course and distance are probable only where it is intended to abandon ideal or mathematical lines for visible boundaries.* If the intention is to convey a tract of given dimensions, as contended here by defendants, the fact is undeniably the opposite; *in such case all the danger of mistake is in the monuments—none whatever in the courses and distances. It may indeed be true that in a certain secondary sense the greater certainty of monuments is the reason for their supremacy; but the reason why they are more certain, and the primary or ultimate reason of their supremacy, is that the object to be attained is the identification of the tract actually demarkated.*

(*c.*) To construe the words of the Chief Justice commencing, "and mistakes in course and distances are more probable," as designed to assign a *second* rather than a *secondary* reason

for the rule, makes his sentence ungrammatical by reason of the absence of the word "that," by which the clause would have been preceded had such been his meaning.

(*d.*) It is not supposable that the Chief Justice, in seeking the reason of the rule in order to ascertain its scope, intended to assign as concurrent two utterly inconsistent reasons, one of which would necessitate the doctrine of this court, "that the universal rule is this, that whenever natural and permanent objects are embraced in the calls these have absolute control, and both course and distance must yield to their influence;" the other of which would lead naturally on to the Texas doctrine, that "there is no rule fixing the effect of any call found in a grant, or giving one more weight or importance than another."

While there is a certain logical relationship between these two reasons when the latter is thrown into a position purely subsidiary and secondary to that of the former, they are of absolutely antipodal tendencies when deployed as concurrent reasons or as two parts of one reason. The former means, as it says, simply, that as a matter of legal construction the intention of the parties always is to convey the demarkated tract. If the latter is construed to mean merely that the monuments are the best identifiers of the tract which was actually demarkated, which is the only sense in which the Chief Justice employed it, then it is at once seen that the latter, as well as the former, is an inflexible proposition. It becomes flexible only when it is

perverted from this meaning, and is so applied as to signify, not that the monuments are the most certain evidence of the demarkated tract, but that they are the most certain evidence of the land intended to be conveyed, whether demarkated or not.

(*e.*) In this connection, Land Company *vs.* Saunders, 103 U. S., 316, adjudicated one of two things, by either of which the defendants are dislodged from the positions now under view. That case cannot be otherwise construed than as determining either that their relative exemption from error is not the primary cause for the supremacy of monuments, or that, if such is the reason, the rule is one which nevertheless operates inflexibly without relaxing in particular instances because the preponderance of certainty by force of particular circumstances passes over from the monuments to the courses and distances. In that case the line of the grant was extended more than a mile beyond the specified distance in order to reach the side line of an adjoining survey known as Hart's location, which was named as the monument. The side line of Hart's location had never been definitely located, was dependent for its location upon a long series of courses and distances named in the Hart grant, and it was, moreover, conceded by this court in its opinion that the parties, in naming it as a monument, probably proceeded upon a mistaken assumption of its true location. If the balance of certainty can ever shift from monuments to courses and distances, it was shifted there. By

evidently accomplished counsel for the losing party it was argued most skillfully and persuasively that the rule of monumental supremacy ceased under such circumstances, it amounting in fact simply to this, that "that which is more certain shall prevail over that which is less certain," from which he argued that the rule is applicable only to monuments capable of being located independently of course and distance, and concerning the location of which no misapprehension could have existed; to all of which this court made answer, "Hart's location is called for, and to that location we are bound to go." That decision was in full accordance with the established law of the States generally where the rule of monumental supremacy is administered in anything like its purity. They hold that the monument prevails, notwithstanding that uncertainty may be shown to have existed as to its location, and although resort to the courses and distances of other surveys may be necessary in order to identify it.

Corn *vs.* McCrary, 48 N. C., 496.

Cansler *vs.* Fite, 50 N. C., 424.

Grabeal *vs.* Powers, 76 N. C., 70.

Younkin *vs.* Cowen, 34 Pa. State, 198.

Caldwell *vs.* Haller, 40 Pa. State, 160.

Ake *vs.* Mason, 101 Pa. State, 17.

In Texas the contrary is of course held.

McGowan *vs.* Hill, 26 Texas, 359–361.

Gerald *vs.* Freeman, 68 Texas, 201.

IV.

Cases involving a repudiation of the doctrine of this court, declared in McIver's Lessee vs. Walker, 9 Cranch, 173, 178, and in the later decisions cited on pages 89-92 of our principal brief, that the supremacy of monuments is not impaired by the fact that they were designated without actual measurements.

Texas is the only jurisdiction from which the defendants are able to cite decisions which can be plausibly claimed to antagonize the doctrine of this court upon this subject. In New York Company vs. Thompson, 83 Texas, 169, the surveyor had been instructed to locate the land warrants upon Devil's river, and it was found by the court that he supposed he had done so. The surveys were also returned and described as abutting upon that river. The court found, however, that he was mistaken as to the location of the river, and that as he had located the lands without actual survey and without actual knowledge as to the location of the river, the call for the river must be abandoned in favor of courses and distances.

It will be noticed that the facts of that case were more extreme than those of the case at bar. The testimony here shows that the surveyor, Howe, ran and blazed the east, west, and the north lines of the entire township, setting

posts at the corners of each of the exterior sections and setting a meander post at the point on the shore of Cedar Island lake where it is first intersected by the north town line as it proceeds from the northeast to the northwest corner of the township. *By reference to Exhibit "B" of the record, found also at page 8 of our principal brief, it will be seen that a person standing at the point where this meander post was erected can completely survey the entire length of Cedar Island lake to its extreme southwesterly limit in section 9.* The surveyor was at the lake and saw practically every part of it. He knew where it was and what it was, and the utmost that can be claimed is, not that he located its boundaries by entirely uninformed conjecture, but that he substituted ocular estimates for detailed measurements.

In Colcough *vs.* Richardson, 1st McCord, 167, the creek which was ignored in favor of courses and distances had not been designated as a boundary. It had been only incidentally pictured as traversing the land. It has been repeatedly held that in such cases the monumental force of the waterway is not as great as where it is depicted as a boundary and the circumstance was relied upon by the court. That case, however, appears to be irreconcilable with the holding in the very similar case of McIver's Lessee *vs.* Walker, 9 Cranch, 173–178. The only other authorities cited in this connection by defendants are the following, none of which are at all in point: Kirwan *vs.* Murphy, 189 U. S., 35–54, merely held that whatever may

be the legal rights of patentees such as these defendants, a threatened resurvey of the land does not involve injury of such a character as to justify its restraint by injunction, and that a due respect for the administrative functions of the Land Office also precludes injunction.

French-Glenn Company *vs.* Springer, 185 U. S., 47–51, was not a case of no survey. The survey had been regularly made, except that it had been terminated upon a swamp instead of being extended to the adjacent lake.

King *vs.* Watkins, 98 Fed. Rep., 913, besides being reversed, as already noticed (55 C. C. A., 290), contained only a dictum that the surveyor's mistake as to the locality of the monument would invalidate it, and even that dictum would be satisfied by the facts of our case, for here it affirmatively appears that the surveyor had a complete view of the entire lake, so that its location was in fact known to him, which is all that the dictum in question requires.

Chapman *vs.* Polack, 70 Cal., 487, cited at page 30, defendants'.principal brief, was not a case of no survey, although it involved a subdivisional line not actually run out, because not required so to be, by the regulations. It is as striking and beautiful an illustration of the supremacy of monuments as can be found in the books. At the time of the survey there was upon the section a building known as the Geyser hotel, which was depicted upon the official plat as returned by the surveyor general. The subdivisional lines of the section, though of course not actually run, were, as

is customary, laid down upon the plat, and exhibited the hotel as standing upon a particular quarter of the section. It was held that the subdivisional lines, when run out upon the ground, must be deflected from their nominal course to such extent as might be necessary to bring the hotel into that quarter of the section where, according to the plat, it belonged.

Beatty *vs.* Robertson, 130 Ind., 589, and Doe *vs.* Hildreth, 2 Ind., 274, cited at page 30 of defendants' principal brief, merely hold that in the event of a discrepancy between plat and field-notes, the former controls; with which doctrine, whether right or wrong, we take no issue.

Chase *vs.* Brandt, 45 Minn., 93, cited on the same page, simply enforced the monuments against discrepant statements of distance.

MISCELLANEOUS POINTS.

In construing that part of the Federal statute regulating the public land surveys which gives supremacy to monuments, it must be recognized as substantially declaratory of pre-existing common-law principles, and not as aiming at the erection of novel and arbitrary regulations, as suggested by defendants. The statute has always been construed as extending the principle of supremacy no less to natural monuments adopted by the surveyor than to artificial marks made by him. The case of Chapman *vs.*

Polack, 70 Cal., 487, cited by the defendants and hereinbefore referred to, is in point. A building standing upon the land at the time of the survey and appearing upon the plat was deemed adopted as a monument, and to be as forceful as the section corners established by the surveyor.

The wide departure of the New York and Massachusetts cases from the doctrine of the Federal courts is attested by the significant fact, disclosed by an examination of Ash's Federal Citations, that none of the New York or Massachusetts cases hereinbefore referred to appear ever to have been cited as authority by a Federal court, except the case of Davis *vs.* Rainsford, cited in 2 Black, 504, and 98 Fed., 250, merely to the effect that the notations of a plat prevailed over specifications of course and distance.

The singular results to which the formulas of the New York and Massachusetts courts naturally lead are illustrated by the case of People *vs.* Jones, 49 Hun., 365, where, applying those formulas, it was held that the conveyance of a lot extending 210 feet to the beach of Lake Ontario conveyed the 210 feet only, although the beach was still 30 feet away.

The supreme court of Minnesota, in its opinion in this case, construed the Shermeier decision as involving not a question of boundary, but of riparian rights. No question of riparian rights was involved in the case. The land there in controversy was a low tract, part of the time an island, lying between the high-water and the low-water mark. Under

the law of Minnesota, the low-water mark of a navigable stream is the dividing line between private and public property, and the only question was whether the low-water mark or the meander line was to be deemed the boundary.

The entire absence of difficulty in distributing among the several parties in interest the area between the meander line and the shore line of the lake is well illustrated by the case of Hanson *vs.* Rice (Minn.), 92 N. W., 982, where, since the decision of the case at bar, it was held by the Minnesota court that the lake there in question was the boundary, though thirty rods beyond the meander line; and the tract between the meander line and the lake shore was held partitionable among the several abutting owners upon the same principle as in cases of reliction.

We may be pardoned for noting here, in conclusion, the fact which should have been mentioned in our opening statement—that by recognizing the lake as its boundary, section 4 is accorded an area of 620 acres, there being about twenty acres of water. Deducting the acreage of the several lots as paid for, conformably to the notations of the plat, Exhibit "A," aggregating 305.11 acres, the excess is seen to be 314.89 acres. The area is therefore slightly more than doubled by recognizing the lake as the boundary.

In our principal brief we suggested that the case should be remanded, with instructions to enter judgment for plaintiffs, as prayed in their complaint. This was not strictly

accurate, since no proofs appear to have been made of the damages prayed for. Judgment should be directed in favor of the plaintiffs for the possession of the lands and for costs.

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